Office-Supreme Court, U.S.
FILED
JAN 31 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-935 and 82-1044

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES SENATE, APPELLANT

v.

FEDERAL TRADE COMMISSION, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, APPELLANT

v.

FEDERAL TRADE COMMISSION, ET AL.

ON APPEALS FROM THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION

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QUESTION PRESENTED

The following question was certified to the court of appeals by the district court pursuant to 15 U.S.C. (Supp. V) 57a-l(f)(l):

"Whether Section 2l(a) of the Federal Trade Commission Improvements Act [of 1980], 15 U.S.C. [(Supp. V) 57a-l(a)], and Senate Concurrent Resolution 60, which was approved by the Senate and House of Representatives, (a) violate the principles of separation of powers established in Articles I, II and III of the Constitution; (b) violate the procedures established by Article I for the exercise of legislative powers; and (c) improperly delegate administrative power to Congress without any standards for the exercise of that power."

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OPINIONS BELOW

The opinion of the court of appeals (Sen. J.S. App. 1a-5a)[1] is not yet reported. The order of the district court certifying the constitutional question to the court of appeals (*id.* at 7a-8a) is reported at 1982-2 Trade Cas. (CCH) para. 64,187. The memorandum order of the district court denying the motion of the United States Senate and House of

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[1] "Sen. J.S." refers to the Jurisdictional Statement filed by the Senate in No. 82-935.

Representatives for relief from the certification order (Sen. J.S. App. 13a-20a) is reported at 1982-2 Trade Cas. (CCH) para. 64,865.

JURISDICTION

The judgment of the court of appeals (Sen. J.S. App. 21a-22a) was entered on October 22, 1982. Notices of appeal were timely filed by the United States Senate and House of Representatives on November 4, 1982 (*id.* at 23a; H.R. J.S. App. 1a),[2] pursuant to 15 U.S.C. (Supp. V) 57a-1(f)(2). The jurisdictional statement in No. 82-935 was filed on December 6, 1982, and the jurisdictional statement in No. 82-1044 was filed on December 20, 1982. The jurisdiction of this Court in both cases is invoked under 28 U.S.C. 1252 and Section 21(f)(2) of the Federal Trade Commission Improvements Act of 1980, 15 U.S.C. (Supp. V) 57a-1(f)(2), as extended by Pub. L. No. 97-377 96 Stat. 1830. See note 4, *infra*.

STATEMENT

1.a The Used Car Rule that was promulgated by the Federal Trade Commission in 1981 and is at issue in this case arose out of an investigation conducted in 1973 by one of the Commission's regional offices. See 46 Fed. Reg. 41329 (1981).[3] This investigation resulted in a recommendation that the Commission, pursuant to its authority to make rules regarding deceptive acts or practices in commerce (15 U.S.C. (& Supp. V) 45 and 46(g)), issue a rule to prevent certain deceptive practices in the sale of used cars.

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[2]"H.R. J.S." refers to the Jurisdictional Statement filed by the House of Representatives in No. 82-1044.

[3]The history of the used car rulemaking proceeding is set out in detail in 46 Fed. Reg. 41329-41330 (1981), published when the Commission issued its final rule, and in H.R. Rep. No. 97-586, 97th Cong., 2d Sess. (1982).

In 1975, while the rulemaking proceeding was in progress, the Magnuson-Moss Warranty-Federal Trade Commission Improvements Act became effective. 15 U.S.C. 2301 *et seq.* That Act specifically directed the Commission to initiate a rulemaking proceeding dealing with "warranties and warranty practices in connection with the sale of used motor vehicles." 15 U.S.C. 2309(b). On August 14, 1981, the Commision published its final rule concerning representations of warranty coverage and disclosures of accurate information in connection with the sale of used cars. See 46 Fed. Reg. 41328-41378. The rule requires dealers to post a window sticker on used cars offered for sale to consumers describing: (1) certain major mechanical defects known to the dealer; (2) whether the dealer offers any warranties on the car; and (3) the nature of such warranties.

b. While the used car rulemaking proceeding was still pending, Congress enacted the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374. Section 21(a) of that Act required the Commission to submit all final trade regulation rules to Congress. See 15 U.S.C. (Supp. V) 57a-1(a). Any such rule would become effective unless within 90 days of continuous session the Senate and House of Representatives "adopt[ed] a concurrent resolution disapproving such final rule." 15 U.S.C. (Supp. V) 57a-1(a)(2). If a rule were disapproved, the Commission could promulgate a revised final rule based on the earlier record and any necessary supplementation, and this revision was to be submitted to Congress before becoming effective. 15 U.S.C. (Supp. V) 57a-1(c).

The Act also provided a special mechanism for the prompt resolution of any constitutional challenge to the provision for congressional disapproval of rules. See 15 U.S.C. (Supp. V) 57a-1(f). Under this mechanism, if an action is filed in a United States district court to "construe the constitutionality of" the legislative veto provision, the

district court is required to certify all questions of constitutionality immediately to the appropriate court of appeals, which shall hear the matter sitting en banc.[4]

Consistent with the requirements of Section 21 of the 1980 Act, the Commission submitted its final Used Car Rule to each House of Congress on September 9, 1981.[5] On May 18, 1982, the Senate passed Senate Concurrent Resolution 60, disapproving the Rule. 128 Cong. Rec. S5402 (daily ed. May 18, 1982).[6] The House of Representatives passed the resolution on May 26, 1982. 128 Cong. Rec. H2882-H2883 (daily ed. May 26, 1982). In view of the legislative veto of the Rule, the Federal Trade Commission issued a statement indicating that it was taking the matter under advisement pursuant to Section 21(c) of the 1980 Act, which, as stated above, provides for possible revision and resubmission of the Rule to Congress. See 47 Fed. Reg. 24542 (1982).

2. Following the legislative veto of the Rule, appellees Consumers Union of the United States, Inc., and Public Citizen, Inc., filed this action in the United States District

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[4]Section 21 of the 1980 Act was to lapse on September 30, 1982. See Section 21(i) of the (1980) Act, 94 Stat. 396. However, Section 101(a)(3) of Pub. L. No. 97-276, 96 Stat. 1186, by incorporating the substance of S. 2956 (97th Cong., 2d Sess.), which was reported to the Senate on September 24, 1982, temporarily continued Section 21 in effect. Section 21 was further extended through September 30, 1983 by Pub. L. No. 97-377, 96 Stat. 1830. See 128 Cong. Rec. H10564 (daily ed. Dec. 20, 1982).

[5]Because of the technicalities of the continuous session requirement (see 15 U.S.C. (Supp. V) 57a-1(g)), the rule was resubmitted to Congress on January 28, 1982 (Sen. J.S. App. 2a n.3).

[6]The resolution provided in full: "*Resolved by the Senate (the House of Representatives concurring),* That the Congress disapproves the final rule promulgated by the Federal Trade Commission dealing with the matter of the trade regulation rule relating to the sale of used motor vehicles, which final rule was submitted to the Congress on January 28, 1982" (Sen. J.S. App. 24a).

Court for the District of Columbia on June 2, 1982. The Federal Trade Commission, the United States Senate, and the House of Representatives were named as defendants. The plaintiffs alleged that their members would be directly harmed by the legislative veto and the consequent failure of the Commission to make the Used Car Rule effective (H.R. J.S. App. 4a-5a). They sought a declaratory judgment that the legislative veto provisions of the Federal Trade Commission Improvements Act, as well as the veto resolution itself, are unconstitutional. In addition, they sought an order requiring the Commission to implement its final Used Car Rule (*id.* at 7a-8a).

On June 29, 1982, the district court certified the constitutional question to the court of appeals (Sen. J.S. App. 7a-8a). On July 23, 1982, the district court denied a motion filed by the Senate and the House of Representatives for relief from this order, concluding that there were no factual issues to be resolved by the district court in order to facilitate the court of appeals' resolution of the constitutional question certified to it (*id.* at 13a-20a).

3. On consideration of the certified question, the court of appeals, sitting en banc, unanimously held[7] that the legislative veto provisions of Section 21(a) of the Federal Trade Commission Improvements Act and Senate Concurrent Resolution 60 passed pursuant to that Section "violate the principles of separation of powers established in Articles I, II and III of the Constitution" and "violate the procedures established by Article I for the exercise of legislative powers" (Sen. J.S. App. 4a). In so holding, the court adopted the reasoning of the panel of that court in *Consumer Energy Council of America* v. *FERC*, 673 F.2d 425 (D.C. Cir. 1982), appeals docketed and petitions for cert. pending, Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209,

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[7]Judges Wald, Mikva and Scalia did not participate.

which, the en banc court noted, had "thoroughly considered and disposed of" the constitutional issues (Sen. J.S. App. 4a).[8]

The court of appeals also concluded as a threshold matter that the plaintiffs had standing to bring the constitutional challenge. The court observed that it was undisputed that Congress, in expressly authorizing "[a]ny interested party" to file an action challenging the statute's legislative veto provisions (15 U.S.C. (Supp. V) 57a-l(f)(l)), intended to permit standing to seek judicial review to the full extent permitted by Article III of the Constitution (Sen. J.S. App. 2a). The court of appeals observed that both Consumers Union and Public Citizen "speak on behalf of consumers, in this instance, used car purchasers, who seek disclosures that would assist them in making informed purchasing decisions," and that "but for the veto's intervention, the FTC's used car rule would have secured significant assistance and protection for the used car buyers they represent" (*id.* at 2a-3a). This injury, the court concluded, satisfies Article III standing requirements.

The court of appeals similarly held that the present case satisfies the adverseness requirements of Article III, noting that "[t]he House and Senate, as named defendants, have vigorously aired their position on the constitutionality of the congressional veto, and have not sought dismissal of the complaint against them" (Sen. J.S. App. 3a).

DISCUSSION

The en banc court of appeals, adopting the reasoning of the panel of that court in *Consumer Energy Council of*

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[8]In view of its conclusion on the other aspects of the certified question, the court of appeals declined to express an opinion as to whether Section 21(a) of the Act and Senate Concurrent Resolution 60 improperly delegated administrative power to Congress without any standards for the exercise of that power (Sen. J.S. App. 5a).

America v. *FERC*, unanimously held that the legislative veto provision of the Federal Trade Commission Improvements Act and the concurrent resolution of disapproval passed pursuant to that provision are inconsistent with the procedures in Article I of the Constitution for the exercise of legislative powers and violate the principles of separation of powers established by Articles I, II and III of the Constitution.

The constitutionality of the legislative veto device is an issue that plainly warrants resolution by this Court. However, the Court heard reargument on December 7, 1982, in *INS* v. *Chadha*, Nos. 80-1832, 80-2170 and 80-2171, which also presents this issue. In the briefs on behalf of the Immigration and Naturalization Service in *Chadha*, we have argued that the legislative veto device is unconstitutional for essentially the same reasons given by the District of Columbia Circuit in *Consumer Energy Council of America* v. *FERC*, and adopted by the en banc court in this case. Accordingly, we suggest that these appeals be held pending a decision by this Court in *Chadha*.

As we have explained more fully in the Memorandum for the United States in *Consumer Energy Council of America* (at 12-18), the Constitution furnishes no basis for distinguishing this case from *Chadha* on the grounds that it involves a legislative veto of a rule rather than an order entered at the conclusion of an adjudicatory proceeding and that the Officers of the United States responsible for promulgating the rule may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. 15 U.S.C. 41; see *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). Nor does the fact that this case involves a statute authorizing a two-House legislative veto, and therefore does not violate the bicameralism requirement of Article I, Sections 1, 7 and 8 of the Constitution, distinguish it

from *Chadha* and *Consumer Energy Council of America* for purposes of constitutional analysis. Section 21(a) of the Federal Trade Commission Improvements Act does not provide for a resolution of disapproval to be presented to the President, as required by Article I, Section 7 of the Constitution, and it violates the principles of separation of powers by directly involving the Legislative Branch in the execution of the laws. These are independent grounds for invalidation of the legislative veto device. Sen. J.S. App. 4a; *Consumer Energy Council of America* v. *FERC, supra,* 673 F.2d at 461-477.[9]

2. The House of Representatives, but not the Senate, has raised two issues in addition to the constitutionality of the legislative veto provision in 15 U.S.C. (Supp. V) 57a-1(a): (i) whether appellees Consumers Union and Public Citizen have standing to bring this suit, and (ii) whether there is an absence of "adverseness" in the case that deprives the courts of jurisdiction under Article III of the Constitution. See H.R. J.S. 8-12. These questions are insubstantial, and the unanimous en banc court of appeals correctly rejected the House of Representatives' contention as to each.

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[9]Paragraph (3) of the judicial review provision of Section 21 of the Federal Trade Commission Improvements Act provides that "[i]t shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under paragraph (1)." 15 U.S.C. (Supp. V) 57a-1(f)(3). The Court already has received full briefing and has twice heard argument on the constitutionality of the legislative veto in *Chadha*. Because the decision in *Chadha* may dispose of the constitutional questions presented in this case, holding the instant appeals pending the decision in *Chadha* is, in our view, fully consistent with the congressional purpose underlying 15 U.S.C. (Supp. V) 57a-1(f)(3) of obtaining a prompt ruling by this Court on the constitutionality of the legislative veto device. The Senate has expressly refrained from moving that its appeal be expedited, because it recognizes that the Court's disposition of *Chadha* "may affect future proceedings in this appeal" (Sen. J.S. 9 n.7). The House of Representatives likewise has not moved to expedite its appeal.

a. The court of appeals noted that it was "undisputed" in this case that Congress, by granting a right to "[a]ny interested party" to challenge the constitutionality of the legislative veto device, intended to permit standing to seek judicial review to the full extent permitted by Article III. Sen. J.S. App. 2a; compare *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 372 (1982); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 103 n.9, 109 (1979). The House of Representatives does not contend otherwise. See J.S. 11.

As the court of appeals found, appellees Consumers Union and Public Citizen speak on behalf of used car purchasers who seek disclosures that would assist them in making informed decisions,[10] and they alleged that but for the legislative veto, the Federal Trade Commission's Used Car Rule would have provided significant assistance and protection for the used car buyers they represent (Sen. J.S. App. 3a). The court of appeals correctly concluded that this injury to the organizations' members satisfies Article III standing requirements. See also *Buckley* v. *Valeo*, 424 U.S. 1, 11-12 (1976). This Court recently held that the injury sustained as a result of the inability to obtain accurate information in the manner required by statute satisfies Article III standing requirements. *Havens Realty Corp.* v. *Coleman, supra*, 455 U.S. at 373-374. It follows from *Havens Realty* that the injury sustained by the members and employees of Consumers Union and Public Citizen as a result of the legislative veto of a rule that would have provided for the furnishing of information likewise satisfies Article III standing requirements.

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[10]See H.R. J.S. App. 4a-5a (allegations in complaint concerning injury to members); Sen. J.S. App. 11a-12a (stipulation between plaintiffs and Federal Trade Commission concerning facts as to standing).

b. The House of Representatives also errs in contending (J.S. 8-10) that this case lacks the "adverseness" required by Article III of the Constitution. The Federal Trade Commission did not place the Used Car Rule into effect because of the legislative veto of that Rule. The Commission's failure to do so injured the consumers that Consumers Union and Public Citizen represent, and this injury would be redressed if the district court on remand ordered the Commission to make effective and implement the Rule—the relief sought in the complaint (H.R. J.S. App. 8a)—or remanded to the Commission for further consideration without regard to the legislative veto. As we explain in our Reply Brief to the Motions to Dismiss the INS's appeal in *Chadha* (at 11-14)[11] and in the principal brief on the merits in *Chadha* (at 73-74),[12] the agency's refusal to grant the relief requested furnishes the necessary adverseness for Article III purposes, irrespective of whether the agency and the private party or parties agree on the merits of the underlying constitutional question.[13] Thus, the House of Representatives' argument would be without merit even if the Senate and House of Representatives were not parties in this case.

The Senate and House of Representatives are parties, however, and they have actively defended the validity of the legislative veto. The House of Representatives contends (J.S. 9 & n.6) that it was not amenable to suit. But even if the House is correct on this point, the Senate does not assert an

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[11]1981 Term, No. 80-1832.

[12]1981 Term, Nos. 80-1832, 80-2170 and 80-2171.

[13]The Federal Trade Commission has declined to place the Used Car Rule into effect pending a final judicial resolution of the constitutionality of the legislative veto of that Rule and has deferred to the Attorney General for the presentation of legal argument regarding the constitutionality of Section 21(a) of the Federal Trade Commission Improvements Act.

immunity defense in this Court. As the court of appeals observed (Sen. J.S. App. 3a-4a), a Senate resolution authorized the Senate Legal Counsel to defend the Senate in this case. Moreover, the Senate concedes (J.S. 5 n.6) that it did not move to be dismissed from the case and that it presented a defense of the statute on the merits, and the Senate now urges (J.S. 7,9) the Court to reach and decide the question of the constitutionality of the legislative veto. Thus, whatever the proper resolution of the House of Representatives' immunity point, the Senate's current posture plainly lends an additional adversariness to the proceedings.

CONCLUSION

The appeals should be held pending the Court's decision in *INS* v. *Chadha* and disposed of in light of that decision.

Respectfully submitted

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Solicitor General

JANUARY 1983

DOJ-1983-01